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21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN FRANCISCO DIVISION

24 ORACLE AMERICA, INC.
25 Plaintiff,
26 v.
GOOGLE INC.
27 Defendant.

Case No. CV 10-03561 WHA
ORACLE'S RESPONSE TO ECF NO. 1535
Dept.: Courtroom 8, 19th Floor
Judge: Honorable William H. Alsup

Oracle shares the Court's privacy concerns and appreciates the Court's careful attention to the nuances of this issue. Oracle's primary concern is avoiding problems that can sometimes arise during trial due to juror social media use. This case is highly publicized and has generated a significant amount of commentary over the Internet. Accordingly, while Oracle will not use Internet or social media searches on prospective jurors during voir dire, Oracle requests that the Court, as it did during the previous trial, provide clear instructions to the jury regarding juror Internet and social media use during trial and deliberations. *See Judicial Conference Committee Model Instruction* located at <http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial> (last visited March 15, 2016).

After the jury is sworn, the parties have the right (and some courts suggest a responsibility) to conduct limited, passive Internet searches for public social media posts in order to monitor for potential misconduct. *See* ECF No. 1529 at 3:4-4:13; 6:1-12. As the New York City Bar Association opinion on jury social media searches indicates, "courts are increasingly called upon to determine whether jurors' social media postings require a new trial," and where a lawyer discovers improper social media activity, she should immediately inform the Court. *See* <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02> (last visited March 15, 2016).

Oracle hereby responds to the specific questions posed in the Court's Further Request for Information re Proposed Social Media Searches (ECF No. 1535) as follows:

Question 1: To what extent will your investigators be merely members of the general public versus having and logging onto Facebook accounts (and other social media accounts) in conducting searches?

Oracle's Response: Neither Oracle nor anyone working with Oracle will log into any social media accounts to conduct searches on jurors or prospective jurors at any time.

Question 2: In the past, Facebook's default privacy setting was to extend access to "friends of friends." This means that if the investigator is a friend of a friend of a prospective juror (and the juror has rested on that default setting or otherwise made his or her profile accessible to friends of friends) then the investigator will be able to see personal information of

1 the prospective juror not otherwise public. To what extent do you contend that you should be
 2 allowed to exploit the fortuity of a friend of a friend circumstance? And, how would you even
 3 know that access was being allowed on that basis rather than on a public basis?

4 **Oracle's Response:** Oracle does not believe that the parties should be allowed to exploit
 5 the fortuity of a friend of a friend circumstance. Oracle's agreement not to conduct any logged-in
 6 searches eliminates the potential circumstance contemplated by the Court's question.

7 **Question 3:** The judge presumes that neither side would exploit a situation in
 8 which the investigator is a direct "friend" of the prospective juror so as to access information
 9 available only to direct friends of the prospective juror. Please confirm (or deny) this assumption.

10 **Oracle's Response:** Confirmed.

11 **Question 4:** For each of your proposed investigators who will log into Facebook
 12 (or other social media accounts), state their name and the number of friends they have established
 13 on their Facebook accounts (or other quantifiable connections such as followers on Twitter).

14 **Oracle's Response:** Not applicable. See response to Question 1.

15 **Question 5:** State how you intend to use Facebook (or other) information
 16 regarding (i) political preferences of prospective jurors, (ii) their religious preferences, (iii) their
 17 relationship status, (iv) their photographs, (v) books, movies, and other items they have "liked,"
 18 (vi) their favorite quotes, (vii) their location "check-ins," and (viii) their postings.

19 **Oracle's Response:** As described above, Oracle has agreed not to conduct social media
 20 research on prospective jurors during voir dire, and therefore will not be gathering the
 21 information identified by the Court for use during voir dire. After the jury is sworn, also as
 22 described above, Oracle seeks the Court's approval to conduct passive Internet searches for
 23 public postings by jurors during and after trial for the narrow purpose of discovering possible
 24 juror misconduct that should be brought to the Court's attention. As stated above, Oracle will
 25 not conduct any logged-in searches at any time.

26 **Question 6:** Give at least three concrete examples of information you expect to
 27 find on a prospective juror that would lead to a for-cause challenge that would be unlikely to
 28 surface during normal voir dire.

1 **Oracle's Response:** Although Oracle does not intend to use social media information
2 during voir dire and does not expect any jurors or prospective jurors to engage in misconduct,
3 three concrete, real world examples of information that did not surface during normal voir dire
4 but that surfaced due to Internet searches are (1) social media connections to a witness or party,
5 *see Sluss v. Commonwealth*, 381 S.W.3d 215, 221-22 (Ky. 2012); (2) social media
6 communications showing prejudice, *see Shaw v. State*, 139 So. 3d 79, 88 (Miss. Ct. App. 2013)
7 (court removed juror due to improper social media messages discovered during trial); and (3)
8 dishonest answers regarding personal history, *see United States v. Parse*, 789 F.3d 83, 89 (2d Cir.
9 2015) (Internet searches revealed that juror had answered dishonestly regarding criminal history
10 and state bar membership).

11
12 Dated: March 17, 2016

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15
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